Weng Lee Granite Quarry Sdn Bhd v Majlis Perbandaran Seberang Perai

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-110–11 OF 2018(P)
AHMAD MAAROP PCA, AZAHAR MOHAMED CJ (MALAYA), RAMLY ALI, ALIZATUL KHAIR AND NALLINI PATHMANATHAN FCJJ
15 OCTOBER 2019

Statutory Interpretation — Construction of statute — Whether prohibitory or regulatory — Express condition in title issued under National Land Code (Penang and Malacca Titles) Act 1963 ('the 1963 Act') allowed appellant to carry out mining activities/remove materials from its land unaffected by any other written law prohibiting such activities — Local authority ordered appellant to stop quarrying activities on its land under s 70A of Street, Drainage and Building Act 1974 until appellant had applied for and obtained earthworks plan approval ('EPA') to continue such operations — Whether s 70A was ultra vires express condition permitted by the 1963 Act — Whether s 70A prohibited appellant's activities absolutely or merely regulated manner in which they were carried out so that earthworks were done in safe and organised manner without endangering environment, people and property — Whether express condition in land title did not mean appellant could carry out quarrying activities in any manner it liked — Whether express condition did not exempt appellant from having to comply with s 70A which regulated and supervised quarrying activities for the public good

The appellant had for some 30 years carried on quarrying activities on its lands ('the lands') situated near a dam in the Seberang Perai municipal area when it suddenly received a stop-work order from the respondent and was told to obtain an earthworks plan approval ('EPA') from the respondent before it could resume the activities. The appellant did not protest but applied for and obtained the EPA which was subject to several terms and conditions. About 11 years thereafter, the respondent again issued another stop-work order on the ground the appellant had breached the conditions of the EPA (by exceeding the minimum earth-cutting levels allowed). The appellant was told it could only resume works if a new EPA was applied for and obtained. The stop-work order was issued under s 70A of the Street, Drainage and Building Act 1974 ('the 1974 Act') which prohibited anyone from carrying out earthworks unless the local authority had approved plans and specifications submitted in respect of same. The appellant applied to the High Court for: (a) a declaration that the lands were exempt from s 70A or any other conditions imposed under the 1974 Act ultra vires the National Land Code (Penang and Malacca Titles) Act 1963 ('the 1963 NLC') since titles to lands issued under the 1963 NLC contained the express condition ('Condition B') that the lands were unaffected by any

provision in any other written law, including the National Land Code, prohibiting mining or the removal of specified materials beyond the boundaries of the lands; and (b) damages against the respondent for preventing the appellant from carrying out quarrying activities on the lands. The High Court allowed the appellant's claim and allowed the reliefs sought for, including damages to be assessed. The court ruled that s 70A did not apply to the lands by reason of Condition B, thereby effectively holding that the 1974 Act was a written law that prohibited the appellant's activities. The Court of Appeal ('COA'), however, set aside the decision on appeal, holding that s 70A was not prohibitory but only regulatory. The COA ruled, inter alia, that: (i) the EPA did not prohibit the appellant's quarrying activities but merely regulated them so that they did not endanger the environment (especially as the lands were close to the dam); (ii) conditions had to be imposed for the manner in which the quarrying activities were carried out for the public good; and (iii) a stop-work order had to be issued if there was breach of the conditions imposed; such an order did not make the 1974 Act a law that prohibited the quarrying/mining activities envisaged by Condition B. The appellant was granted leave to appeal to the Federal Court against the COA's decision on the question whether s 70A of the 1974 Act had the effect of prohibiting the quarrying activities on the lands in direct contradiction to the provisions of the 1963 NLC and Condition B.

Held, dismissing the appeal:

(1) Section 70A of the 1974 Act was regulatory and not prohibitory in that it only regulated the procedure for carrying out earthworks, which included the appellant's quarrying activities. Section 70A did not prohibit earthworks absolutely but only regulated the manner in which they were carried out so as not to endanger or harm the environment. It was essentially for the public good. The restriction placed merely ensured that the proprietary rights of the appellant over its lands were exercised in a proper and responsible manner. Condition B only gave the appellant the right to quarry; it did not mean that the appellant could carry out quarrying activities in any manner it liked. Condition B did not exempt the appellant as landowner from having to comply with s 70A which regulated and supervised quarrying activities (see paras 19–20 & 68–69).

(2) It was emphasised during the Parliamentary debate to introduce s 70A into the 1974 Act, that s 70A would apply to the mining industry in order to control environmental pollution. In short, the 1974 Act provided the foundation for the development of an effective, efficient and competitive regulatory environment for the street, drainage and building sector including the mining industry. Under the scheme of the 1974 Act, as the authority responsible for granting the EPA, the respondent was responsible for controlling, supervising and regulating the manner in which earthworks were carried out to ensure that landowners at all times

complied with the procedural conditions imposed. The respondent had a public policy interest in regulating earthworks since they could directly threaten physical harm to persons or property and were capable of giving rise to considerable environmental impacts. Accordingly, the respondent, as the controlling authority, was empowered to grant or withhold the granting of the EPA or to impose certain legal limitations on the land (see paras 63, 65 & 67).

(3) The respondent's discretion in granting an EPA was not an absolute or arbitrary one but was confined and restricted to considering and ensuring that the plans and specifications in the earthworks plan conformed with prescribed standards to ensure safety in accordance with the guidelines set out in the Earthworks (Municipal Council of Province Wellesley) By-Laws 1992 enacted under s 70A(17) of the 1974 Act. Such discretionary powers were not without legal limitations. The respondent had to use its powers judiciously and within the limits prescribed by law (see paras 44 & 66).

[Bahasa Malaysia summary

Perayu telah selama 30 tahun menjalankan aktiviti kuari di atas tanahnya ('tanah tersebut') yang terletak berhampiran dengan empangan di kawasan perbandaran Seberang Perai apabila ia tiba-tiba menerima perintah berhenti kerja daripada responden dan diberitahu untuk mendapatkan Kelulusan Rancangan Kerja Tanah ('KRKT') daripada responden sebelum ia dapat meneruskan aktiviti. Perayu tidak membantah tetapi memohon dan memperoleh KRKT yang tertakluk kepada beberapa terma dan syarat. Lebih kurang 11 tahun selepas itu, responden sekali lagi telah mengeluarkan satu lagi perintah berhenti kerja atas alasan perayu melanggar syarat-syarat KRKT (dengan melebihi tahap minimum pemotongan tanah yang dibenarkan). Perayu diberitahu ia hanya boleh menyambung semula kerja jika KRKT baru telah dipohon dan diperolehi. Perintah berhenti kerja dikeluarkan di bawah s 70A Akta Jalan, Parit dan Bangunan 1974 ('Akta 1974') yang melarang sesiapa melakukan kerja tanah melainkan pihak berkuasa tempatan telah meluluskan pelan dan spesifikasi yang dikemukakan berkenaan dengan perkara yang sama. Perayu memohon kepada Mahkamah Tinggi untuk: (a) suatu deklarasi bahawa tanah itu dikecualikan daripada s 70A atau apa-apa syarat lain yang dikenakan di bawah Akta 1974 ultra vires Kanun Tanah Negara (Hakmilik Negeri dan Melaka) 1963 ('KTN 1963') kerana hak milik tanah tersebut yang dikeluarkan di bawah KTN 1963 mengandungi syarat nyata ('syarat B') bahawa tanah tersebut tidak terjejas oleh apa-apa peruntukan dalam mana-mana undang-undang bertulis yang lain, termasuk Kanun Tanah Negara, melarang perlombongan atau pengalihan bahan tertentu di luar sempadan tanah; dan (b) ganti rugi terhadap responden untuk menghalang perayu daripada menjalankan aktiviti kuari di atas tanah tersebut. Mahkamah Tinggi membenarkan tuntutan perayu dan membenarkan relief yang diminta,

termasuk ganti rugi untuk ditaksir. Mahkamah memutuskan bahawa s 70A tidak terpakai bagi tanah tersebut oleh sebab syarat B, dengan itu secara efektif memutuskan bahawa Akta 1974 adalah undang-undang bertulis yang melarang aktiviti perayu. Walau bagaimanapun, Mahkamah Rayuan ('MR') mengetepikan keputusan tersebut atas rayuan, dengan memutuskan bahawa s 70A itu tidak melarang tetapi hanya mengawal selia. MR memutuskan, antara lain, bahawa: (i) KRKT tidak melarang aktiviti kuari perayu tetapi hanya mengawal selianya supaya mereka tidak membahayakan persekitaran (terutamanya kerana tanah berhampiran dengan empangan); (ii) syarat-syarat perlu dikenakan ke atas cara aktiviti kuari dijalankan untuk kebaikan orang awam; dan (iii) suatu perintah berhenti kerja harus dikeluarkan jika terdapat pelanggaran syarat-syarat yang dikenakan; perintah sedemikian tidak membuat Akta 1974 suatu undang-undang yang melarang aktiviti kuari/perlombongan seagaimana dinyatakan dalam syarat B. Perayu telah diberi kebenaran untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR mengenai persoalan sama ada s 70A Akta 1974 mempunyai kesan melarang aktiviti kuari di tanah tersebut yang bertentangan langsung dengan peruntukan KTN 1963 dan syarat B.

Diputuskan, menolak rayuan:

(1) Seksyen 70A Akta 1974 adalah bersifat mengawal selia dan bukan larangan kerana ia hanya mengawal selia prosedur untuk menjalankan kerja-kerja tanah, termasuk aktiviti kuari perayu. Seksyen 70A tidak melarang kerja-kerja tanah secara mutlak tetapi hanya mengawal cara mereka dijalankan supaya tidak membahayakan atau membahayakan alam sekitar. Ia pada dasarnya adalah untuk kebaikan masyarakat. Sekatan yang diletakkan semata-mata memastikan bahawa hak pemilikan perayu atas tanahnya dilaksanakan dengan cara yang betul dan bertanggungjawab. Syarat B hanya memberi perayu hak kuari; ia tidak bermakna bahawa perayu boleh menjalankan aktiviti penggalian dalam apa jua cara yang disukainya. Syarat B tidak mengecualikan perayu sebagai pemilik tanah daripada perlu mematuhi s 70A yang mengawal dan mengawal aktiviti kuari (lihat perenggan 19–20 & 68–69).

(2) Ia ditekankan semasa perbahasan Parlimen yang memperkenalkan s 70A ke dalam Akta 1974, bahawa s 70A akan digunakan untuk industri perlombongan bagi mengawal pencemaran alam sekitar. Pendek kata, Akta 1974 menyediakan asas bagi pembangunan persekitaran kawal selia yang berkesan, cekap dan kompetitif untuk sektor jalan, saliran dan bangunan termasuk industri perlombongan. Di bawah skim Akta 1974, sebagai pihak berkuasa yang bertanggungjawab untuk memberikan KRKT, responden bertanggungjawab untuk mengawal, mengawasi dan mengawal selia cara kerja tanah dijalankan bagi memastikan bahawa pemilik tanah pada setiap masa mematuhi syarat prosedur yang dikenakan. Responden mempunyai kepentingan dasar awam dalam

mengawal selia kerja tanah kerana mereka secara langsung boleh mengancam kecederaan fizikal kepada orang atau harta dan mampu menimbulkan impak besar kepada alam sekitar. Oleh itu, responden, sebagai pihak berkuasa yang mengawal, diberi kuasa untuk memberi atau menahan pemberian KRKT atau mengenakan batasan undang-undang tertentu ke atas tanah tersebut (lihat perenggan 63, 65 & 67).

(3) Budi bicara responden dalam memberikan suatu KRKT bukan sesuatu yang mutlak atau sewenang-wenangnya tetapi terbatas dan terhad untuk mempertimbangkan dan memastikan pelan dan spesifikasi dalam pelan kerja tanah serupa dengan piawaian ditetapkan bagi memastikan keselamatan mengikut garis panduan yang ditetapkan dalam Undang-Undang Kecil Kerja Tanah (Majlis Perbandaran Provinsi Wellesley) 1992 yang digubal di bawah s 70A (17) Akta 1974. Kuasa budi bicara itu tidak tanpa batasan undang-undang. Responden hendaklah menggunakan kuasanya dengan bijak dan dalam batas yang ditetapkan oleh undang-undang (lihat perenggan 44 & 66).]

Cases referred to

Attorney-General for Canada v Hallet & Carey Ltd [1952] AC 427 (refd)
Commonwealth of Australia v Bank of New South Wales [1949] 2 All ER 755, PC (refd)
Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 MLJ 369; [1994] 2 CLJ 143, SC (refd)
Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17, CA (refd)
Edinburg Street Tramways Co v Torbain [1877] 3 AC 58, HL (refd)
Government of Malaysia & Anor v Selangor Pilot Association [1977] 1 MLJ 133, PC (distd)
Hughes and Vale Proprietary Ltd v State of New South Wales and others [1954] 3 All ER 607, PC (distd)
M Pentiah and others v Muddala Veeramallappa and others [1961] AIR 1107, SC (refd)
McCarter v Brodie (1950) 80 CLR 432, HC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
Shire of Swan Hill v Bradbury (1937) 56 CLR 746, HC (distd)
Weng Lee Granite Quarry Sdn Bhd v Pentadbir Tanah Pejabat Daerah dan Tanah Seberang Perai Tengah Bukit Mertajam [2014] 9 MLJ 85, HC (refd)

Legislation referred to

Banking and Financial Institution Act 1989 s 45(1)
Commonwealth of Australia Constitution Act 1900 [WA] s 92
Courts of Judicature Act 1964 s 78(1)
Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992

English Charter of Justices 1826 [UK]
Federal Constitution arts 5, 8, 13
Federated Malay States Land Code 1926
Immigration Acts 1959/63 s 59
Land Enactment 1911 s 11
Merchant Shipping Ordinance 1952 ss 29A, 35A
National Land Code ss 40(b), 42, 45(2)(b), 70, 71, 72, 73, 74, 75
National Land Code (Penang and Malacca Titles) Act 1963 ss 2, 36, 45(2), (2)(b), 93(3)(b), Third Schedule, para 2
New South Wales State Transport (Co-ordination) Act 1931–1952 [WA] ss 17(4), 18(5), 19(1)
Port Authorities Act 1963
Street, Drainage and Building Act 1974 ss 70A, 70A(1), (3), (4), (5), (8), (9), (17), (18), 117

Appeal from: Civil Appeal No P-02(NCVC)(W)-278–02 of 2017 (Court of Appeal, Putrajaya)

Lim Choon Khim (Tan Swee Cheng and Chin Yan Leng with him) (SC Tan) for the appellant.
Kanesh a/l Sundrum (Nurul Jannah Zakariah with him) (Kanesh Sundrum & Co) for the respondent.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the judgment of the Court of Appeal that reversed the judgment of the High Court.

[2] This appeal concerns the question of whether a provision in a statute is prohibitory or regulatory in character.

BACKGROUND FACTS

[3] The factual background leading to this appeal is quite simple and straightforward. We will only highlight very briefly the pertinent undisputed facts in so far as they are relevant to the issues that arise for decision in this appeal before us.

[4] Majlis Perbandaran Seberang Perai ('the respondent') is the local authority for the Seberang Perai municipal area.

[5] At all material times, Weng Lee Granite Quarry Sdn Bhd ('the appellant') was a granite quarry operator and the registered owner of pieces of land in the

Seberang Perai municipal area ('the subject lands') on which lands it carried out quarry activities that involved mining operations and the removal of rock materials beyond the boundaries of the subject lands.

[6] Title to each of these subject lands was issued under the National Land Code (Penang and Malacca Titles) Act 1963 ('the 1963 Act'). All titles carry an express condition ('Condition B') that states as follows:

> The land comprised in this title:
>
> (B) Shall not be affected by any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundaries of the land.

[7] Since 1972, the appellant had been carrying out rock quarry activities on the subject lands, which are located next to the Mengkuang Dam in the Seberang Perai municipal area.

[8] In 2001, the respondent issued a stop work notice to the appellant as the appellant was carrying out quarry operations on the subject lands without having first applied for and obtained earthworks plan approval from the respondent. At this point, there was no protest made against the respondent and the appellant readily submitted the earthworks plan, which was approved by the respondent on 15 July 2002. The approval was subjected to various terms and conditions.

[9] However, on 3 April 2013, the respondent again issued a stop work order notice that stated:

(a) the appellant was in breach of the conditions imposed by virtue of the approved earthworks plan dated 15 July 2002; and

(b) unless a new written approval was first obtained, no earthwork may commence on the subject lands.

[10] In point of fact, the appellant had carried out quarry works exceeding the minimum earth cutting levels allowed in the said earthworks plan approval. The notice was issued by the respondent pursuant to s 70A of the Street, Drainage and Building Act 1974 ('the 1974 Act') which stipulated that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

AT THE HIGH COURT

[11] About almost two years after the stop work order notice was issued, on 18 March 2015, the appellant commenced in the High Court the current action under appeal seeking for:

(a) a declaration that the subject lands be exempted from s 70A of the 1974 Act and the imposition of conditions under the Act on the subject lands, ultra vires the 1963 Act; and

(b) damages against the respondent for having prevented the appellant from carrying out quarry activities on the subject lands.

[12] The appellant anchored its case on the primary ground that the provisions of s 70A of the 1974 Act did not apply to the subject lands for the reason that Condition B in the titles, which excludes all written laws prohibiting mining or the removal of specified materials beyond the boundaries of the subject lands.

[13] The learned High Court judge appraised the issues before her as two. First, whether the subject lands which contained condition (B) exempted the appellant from s 70A of the 1974 Act? The second question being whether the imposition of s 70A together with conditions made was ultra vires the 1963 Act.

[14] At the end of a full trial, the learned High Court judge found both the answers in favour of the appellant. The High Court allowed the appellant's claim and granted the relief sought for, including damages to be assessed. The High Court declared that s 70A did not apply to the subject lands by reason of the endorsement of Condition B in the title to these lands. In essence, the High Court held that the 1974 Act is the written law that prohibited mining and removal of rocks as envisaged by Condition B.

AT THE COURT OF APPEAL

[15] The respondent appealed to the Court of Appeal. The appeal was allowed. The Court of Appeal set aside the decision of the High Court. In its judgment, the Court of Appeal made numerous findings and conclusions of primary facts, which can be summarised as follows:

(a) 'Earthworks' defined in s 70A includes quarrying works;

(b) the stop work notice was issued as a result of the appellant's breaches of the conditions imposed on the approved earthworks plan;

(c) in the case of *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133, the Privy Council held that the restriction placed on

A the pilots from exercising their profession was not a prohibition but merely regulatory in nature. This was because the restriction placed on the activities of the individual license pilots did not deprive them of property. Applying that principle the requirement of earthworks plan pursuant to s 70A did not prohibit mining. The requirement of the plan
B was merely to regulate the way mining is to be conducted so as not to endanger the environment, and is essentially for public good;

(d) the High Court judge had taken an inappropriate approach to determine the pertinent issue that the 1974 Act is a law prohibiting mining. The
C stoppage of mining in the stop work notice does not make the 1974 Act a law, which prohibits mining as envisaged by Condition B. The prohibition resulting from the stop work notice took place only upon breach of the 1974 Act but not otherwise. Certainly it was not the correct criteria for classifying the 1974 Act as a law prohibiting mining, by
D looking at the stop work notice. The High Court should have instead, analysed the 1974 Act as a whole and then assessed in particular s 70A, as to whether, it is a law which prohibits mining, or merely a law that regulates mining activity;

E (e) the requirement for approval of the earthworks plan by the respondent cannot amount to prohibition of mining. Section 70A was legislated with the purpose of protecting the environment, especially relating to mining operations. The requirement for approval of an earthworks plan before any mining operation can commence, made pursuant to the 1974 Act
F cannot be construed as prohibiting mining, but it is a mere requisite to operate mining and it is intended for safety and environmental reasons. The High Court erred in holding that the 1974 Act is a law, which prohibits mining as envisaged by Condition B; and

G (f) s 70A is a procedural compliance which the plaintiff had to observe before mining operation can be operated. The applicability of s 70A necessarily meant that the defendant might impose conditions, which the plaintiff would have to comply with. Hence it is clear that the 1974 Act and s 70A in particular, is not a written law prohibiting mining as envisaged by Condition B.

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[16] The present appeal arises from the decision of the Court of Appeal in setting aside the decision of the High Court.

AT THE FEDERAL COURT

I

The question of law on appeal to the Federal Court

[17] On 29 October 2018, this court granted the appellant leave to appeal on the following question:

Whether s 70A of the Street, Drainage and Building Act 1974, which, inter alia, provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, is prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 and *Hughes and Vale Proprietary Ltd v State of New South Wales and others* [1954] 3 All ER 607 carries a condition which states that the land in that title shall not be affected by any provision of the National Land Code or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land, having regard to the Privy Council decisions in and *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133, and the decision of this Honourable Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.

[18] The rival contention of the parties brings into focus whether the provision of s 70A(1) of the 1974 Act is prohibitory or regulatory in character. To put the matter in perspective, it is necessary to set out s 70A(1), with the necessary emphasis, as follows:

No person shall commence or carry out or permit to be commenced or carried out any *earthworks* without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the *approval* of the local authority thereto.

Earthworks

[19] The term 'Earthworks' is defined in s 70A(18) of the Act to include any act of excavation, leveling, filling with any material, piling, the construction of foundations, or felling of trees, on any land, or any other act of dealing with or disturbing any land.

[20] The uncontroverted evidence is to this effect: that the quarry and mining activities undertaken by the appellant on the subject lands involved excavation, leveling and dealing with the land. Hence the quarry and mining activities carried out by the appellant on the subject lands would fall within the ambit of the term 'Earthworks' in s 70A(1) of the Act.

History and background behind the introduction of Condition B

[21] As we shall see, it is important to understand why document of title of land issued under the 1963 Act contains the endorsement of Condition B. It is to be noted that the 1963 Act is only applicable to Penang and Malacca as clearly stated in s 2. It is a special statute for and in respect of land in Penang and Malacca. Conditions B are express conditions which are statutorily provided under ss 45(2) and 93(3)(b) and the Third Schedule of the 1963 Act.

A **[22]** Learned counsel for the respondent carefully traced the legal as well the historical background behind the reason for the introduction of Condition B by the 1963 Act that can be summarised in the following paragraphs.

B **[23]** Prior to the National Land Code ('the NLC'), the position in the Malay states was that the state owned all minerals and rock materials. For example, under s 11 of the Land Enactment 1911 applicable to the Federated Malay States (Selangor, Perak, Negeri Sembilan and Pahang), it was provided that every title to land only entitled the owner to a surface right only in the land and in absence of an express condition to the contrary, a land title did not grant the C right to remove any gravel or stone beyond the boundary of the land.

[24] The Malay States Land Law was thereafter consolidated under the Federated Malay States Land Code 1926, which also introduced the Torrens D Registration System into the Malay States. In 1965, the Federated Malay States Land Code 1926 was repealed and replaced by the NLC. The NLC, among others, maintained the principle that land conveys surface rights only (see ss 40(b) and 45(2)(b)). Hence, the owner of a land, whether held perpetually or held under a term of years, has no proprietary rights over minerals and rock E materials found on his land. Thus, under the NLC a proprietor cannot quarry and remove minerals and rock materials from his land unless he obtains such rights from the state.

[25] However, the position in Penang was the opposite where following the F English Land Law that was introduced by the English Charter of Justices 1826, ownership of land entitled the proprietor to proprietary rights over all mineral and rock materials on the said land (see *Elements of Land Law* by Kevin Gray pp 16 and 26, *Land Law in Malaysia* by Teo Keang Sood p 870 and *Malaya and Singapore — The Borneo Territories* by LA Sheridan p 334).

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[26] In 1963, steps were taken to assimilate the land laws in the Straits Settlement (Penang and Malacca) with the other Malay States. In particular, a uniform system for registration of land dealings (ie the Torrens System) was sought to be introduced across Malaysia. This led to the enacting of the 1963 H Act which is a legislation to provide for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the NLC, and for matters incidental thereto (see preamble of the Act). The 1963 Act provided, amongst others, for replacement titles with similar rights and interests to be I issued to all landowners in Penang to replace the existing land deeds (see s 36).

[27] During the assimilation process with the other Malay States, special provisions had to be introduced to maintain the existing rights of landowners in the Straits Settlement. An example of these special rights was existing

proprietary rights over minerals and rock materials that were hitherto enjoyed by owners of lands in Penang and Malacca. Hence, s 45(2)(b) of the 1963 Act provides that every replacement title shall contain the appropriate condition provided for in the Third Schedule. Paragraph 2 of the Third Schedule provides for Condition B, which has the effect of maintaining of the pre-existing proprietary rights over minerals and rock materials enjoyed by land owners in Penang and Malacca. Thus, Condition B when endorsed on the title, will give the land owner propriety rights over the minerals and rocks material on his land. However, the position in other states are the opposite in that s 42 of the NLC authorises the state to grant such rights over minerals and rock materials through the issuance of what is called a Permit 4C. In such a situation, the landowner will not have to obtain Permit 4C from the state authority to carry out quarry activities (see *Weng Lee Granite Quarry Sdn Bhd v Pentadbir Tanah Pejabat Daerah dan Tanah Seberang Perai Tengah Bukit Mertajam* [2014] 9 MLJ 85). The powers and procedure in relation to the issuance of Permit 4C is provided for in ss 70–75 of the NLC.

Submissions by the appellant

[28] It is against the above background, that learned counsel for the appellant had argued before us that the endorsement of Condition B on the documents of title for the appellant's subject lands means that the appellant is free to carry out quarry activities on the lands without first having to obtain earthworks plan approval from the respondent.

[29] Learned counsel argued that s 70A(1) of the 1974 Act prohibits any form of earthworks unless the approval of the local authority is first obtained. Section 117 of the 1974 Act provides that such approval is given upon the discretion of the local authority. The effect of the said s 70A is to bar the appellant from carrying out any quarry activity on the subject lands unless an approval has been given by the local authority (citing among others *Hughes and Vale Proprietary Ltd v State of New South Wales and others* [1954] 3 All ER 607, *Selangor Pilot Association*, *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, *M Pentiah and others v Muddala Veeramallappa and others* [1961] AIR 1107, *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369; [1994] 2 CLJ 143, *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746). By reason of the foregoing, learned counsel submitted that s 70A of the 1974 Act must be construed as prohibiting mining. However, by virtue of Condition B on the titles concerned, the provisions of s 70A shall not affect the subject lands.

[30] He further put forward an argument that the Court of Appeal fell into serious error when it relied upon the Privy Council decision in *Selangor Pilot Association* and concluded that s 70A of the Act did not constitute 'a written law

which prohibits mining or removal of specified materials from a land' because the provisions therein are regulatory, and not prohibitory, in nature. It was argued that the case does not support the legal proposition that a statutory provision is merely regulatory in nature if its effect is to subject a certain activity to the requirement of an administrative approval or license. In *Selangor Pilot Association*, learned counsel argued, the Privy Council was not invited to decide whether the restriction on the exercise of a pilot was a prohibition. What the board considered, was whether the restriction on the exercise of a pilot's rights given by the grant of a license amounted to a deprivation of property and in violation of art 13 of the Federal Constitution. It was therefore submitted, that a proper reading of the case should have led the Court of Appeal to the conclusion that the said s 70A was prohibitory in nature.

Submissions by the respondent

[31] The main thrust of the contention of learned counsel for the respondent is that Condition B only gives the landowner the right to quarry. It does not regulate the procedure for carrying out quarry activities. Condition B does not exempt the landowner from having to obtain earthworks plan approval from the local authority under s 70A of the 1974 Act for the purposes of regulating and supervising quarry activities.

[32] Hence, the presence of Condition B does not mean that the landowner can carry out quarry activities in any manner he likes. The landowner still has to comply with quarrying procedures.

[33] On the basis of s 70A the requirement for Earthworks approval does not amount to prohibition of mining since the purpose of s 70A is to regulate the way mining is to be conducted so as not to endanger the environment, and is essentially for public good. This is the essence of the contention of learned counsel for the respondent.

[34] Section 70A was introduced primarily to regulate the mining industry for the purposes of controlling environmental pollution. Through approval of earthwork plans, the respondent as the local authority regulates and supervises operations such as hill slope cutting; hill gradients; cleanliness; public safety; water, silt and sediment flow; and enforcement of boundaries and the interests of adjoining land owners.

[35] There is a difference between the word 'prohibiting' which interferes with proprietary rights and 'regulating', which does not interfere with proprietary rights but merely ensures that the proprietary rights are exercised in a proper and responsible manner. The right to carry out quarry activities is clearly different from the regulation and supervision of quarry activities.

[36] Learned counsel invited us to consider that the appellant's granite quarry activities involve the blasting and cutting of hill slopes which are adjoining to the Mengkuang Dam. Without approval of earthwork plans and supervision by the respondent, the appellant would be free to carry out these blasting, cutting and quarrying activities without any regulation and supervision. This would not only endanger lives and properties, but would also lead to uncontrolled soil erosion and environmental pollution.

OUR DECISION

[37] The issues raised and the arguments by both sides turned upon this fundamental question: whether s 70A of the 1974 Act prohibits or regulates quarry activities carried out by the appellant on the subject lands? In the context of the present case it is not disputed that any written law that prohibits quarry activities would have no effect on the subject lands because of Condition B in the titles concerned. In this regard, there is in our judgment, a fundamental distinction between a provision that is prohibitory in character (absolute prohibition to carry out quarry activities), and a provision, which is regulatory in character (controlling, regulating and supervising quarry activities).

[38] Before turning to the rival contentions of the parties, we will first deal with the three cases mentioned in the question of law posed for our determination.

[39] First, the Privy Council decision in *Hughes and Vale Proprietary Ltd v State of New South Wales and others*. In this case, the New South Wales State Transport (Co-ordination) Act 1931–1952 ('the Act'), provided for the licensing of motor vehicles engaged commercially in the transport of passengers and goods on the public highways of New South Wales, and prohibited all unlicensed transportation, and authorised the imposition of certain charges on transport operations. The charges were imposed for the purpose of protecting the railways in New South Wales from competition. The Act effectively prohibited the operation of transport unless authorised by license, which might be granted or withheld at the absolute discretion of a state authority. Section 17(4) of the Act provided that the board shall have power to grant or refuse any application of any person for a license or in respect of any vehicle or of any area, route, road, or district. Section 18(5) of the Act provided that the board may, in any license issued, impose a condition that the licensee shall pay to them such sums as shall be ascertained as the board may determine. Section 19(1) of the Act provided that the board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit. Section 92 of the Commonwealth of Australia

Constitution Act 1900 provided that no duties or charges should be imposed on trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation. The issue arising was whether the prohibition of unlicensed vehicles by the Act was invalid in light of s 92 of the Commonwealth of Australia Constitution Act 1900. The Privy Council held that such a prohibition subject to an absolutely discretionary exemption was not merely regulatory of the trade because the individual was thereby not allowed in effect to carry on his trade at all unless authorised by license, which might be granted or withheld at the discretion of a State authority.

[40] At the hearing before us, learned counsel for the appellant submitted that in *Hughes and Vale Proprietary Ltd*, the Privy Council accepted the proposition made in *Commonwealth of Australia v Bank of New South Wales* [1949] 2 All ER 755 in that a statutory restriction is not merely regulatory in nature when a legislative or executive act operates to restrict such activity directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. According to learned counsel, the Privy Council held that simple prohibition of the trade of an individual or such a prohibition subject to a discretionary exemption was not merely regulatory in nature. Learned counsel emphasised the point that the Privy Council agreed with the analysis undertaken by the dissenting judgment of Fullagar J in the *McCarter v Brodie* (1950) 80 CLR 432, where His Honour held as follows:

> If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a license does not alter the true character of what I am doing. This was, indeed, as I have pointed out, one of the two things that were really decided in *James v Commonwealth*, though it was naturally treated as more or less self-evident, and the contrary view does not seem to have been very seriously argued. Such cases as *Melbourne Corpn v Barry*, and *Swan Hill Corpn v Bradbury*, do not, of course, afford exact parallels to such cases as the present, because they turn primarily on the meaning of the word 'regulate' in a statute, but they are, in my opinion, precisely in point, since one thing that they make plain is that, if a legislative body cannot lawfully prohibit altogether, it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition, but it is quite untrue to say that total prohibition subject to discretionary exemption or 'licensing' is merely partial prohibition within the meaning of that proposition.

[41] Learned counsel then argued that applying the principles enunciated in *Hughes and Vale Proprietary Ltd*, s 70A of the 1974 Act is prohibitory in nature as it bars the appellant from carrying on any quarry activity on the subject lands unless an approval has been given by the local authority.

[42] We have read and given our utmost consideration to the judgment in

the case of *Hughes and Vale Proprietary Ltd*, to point out the difference between that case from our present case. In our opinion that case was decided on the basis that the Act in question effectively prohibited the operation of transport unless authorised by license, which might be granted or withheld at the absolute discretion of a state authority. The main reason why the Privy Council declared it invalid was because the relevant provisions of the Transport Act did not contain any condition as to what someone must do to acquire a license. The conditional prohibition therefore became as good as an absolute prohibition. This can be seen from the judgment of Lord Morton:

> The carriage of goods by road, which forms a most important part of this very thing, is made the subject of heavy imposts and of a definite prohibition except in so far as a branch of the executive government of the State thinks fit to permit particular persons to carry goods by specified vehicles. No conditions are laid down by the fulfillment of which a man may become entitled to a license. It lies entirely within the discretion of the Director of Transport and Highways acting under the direction of the Minister. The refusal of an application for a license on grounds that are arbitrary or fanciful or that no man could regard as lying within the scope or policy of the legislation would not suffice, but the discretion otherwise is absolute and in no circumstances has anyone an enforceable title to a license. To me these rather simple considerations appear decisive. In face of them I have not been able to see how it can be said that this branch of inter-State trade is absolutely free.

[43] Next, the Privy Council itself observed as follows at p 629:

> There are, however, some passages in the judgments of the Chief Justice and Fullagar J, in *McCarter v Brodie* which might be interpreted as necessarily condemning as invalid any licensing system under which an inter-State trader who could comply with all the regulations validly prescribed by law might be refused a licence. Their Lordships can imagine circumstances in which it might be necessary, eg, on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

[44] On the other hand, in our present case, if we read the section in its entirety and within the context of *Hughes and Vale Proprietary Ltd*, then it would appear that there is strictly speaking, no absolute prohibition in s 70A of the 1974 Act. What the applicant has to do is specify his proposed works plan and if approved, can proceed to carry on such works. There is no absolute power on the local authority to prohibit mining for no apparent reasons. More than that, as we shall see later in the judgment, no such absolute discretion is given to the respondent in granting approval to earthwork plans. The respondent's discretion is not absolute or arbitrary but is confined and restricted to considering and ensuring that the plans and specifications of the earthworks conform with the prescribed standards to ensure safety in accordance with specific guidelines, that is to say, the Earthworks (Municipal

Council Of Province Wellesley) By-Laws 1992. This is the crucial difference between our present case and the case of *Hughes and Vale Proprietary Ltd*. For that reason, the case does not support the broad proposition of law, as contended by learned counsel of the appellant, to the effect that s 70A of the 1974 Act is prohibitory in nature as it bars the appellant from carrying on any quarry activity on the subject lands unless an approval has been given by the respondent.

[45] At this juncture, it is opportune we refer to the case of *Shire of Swan Hill v Bradbury* (1937) 56 CLR 746 that was cited by learned counsel for the appellant to support his argument that s 70A of the 1974 Act is prohibitory in nature since the appellant is barred from carrying on any quarry activity on the subject lands unless an approval has been given by the respondent. This was an appeal to the High Court of Australia that concerned the question whether a certain by-law was prohibitory or regulatory. The by-law provided that no person shall erect or cause to be constructed any building unless with the approval of the Council. It was also provided that the council of every municipality with the approval of the Governor-in-Council may make by-laws for the following purposes or any of them or for any purpose in connection therewith: (a) regulating and restraining the erection and construction of buildings erections or hoardings or of fences abutting on or within ten feet of any street or road. Latham CJ held that by withholding approval, the Council could completely control to the point of prevention, the erection of building unless they conform to the ideas of the Council. Latham CJ said:

> Is the by-law valid under the power to make by-laws restraining the erection of buildings? A distinction is drawn in the judgments of the Supreme Court in the present case between restraining a person from a course of action and restraining a particular activity. I find myself unable to appreciate the distinction. Where the restraint which is under consideration is a restraint to be imposed by a by-law the restraint can operate only upon the acts of human beings, and not upon physical objects. It is possible to restrain a river by building an embankment, but it is not possible to restrain anything by means of a by-law otherwise than by restraining persons from a course of action. The power which is relevant in this case is a power to make by-laws restraining the erection and construction of buildings, etc. A by-law can restrain such erection or construction only by operating by way of restraint upon the acts of persons in erecting or constructing buildings. It therefore appears to me that in the relevant connection there is no ground for the distinction suggested between restraining an activity and restraining a person from an activity.

[46] However, the above passage is qualified by the view of Rich J who said:

> In the present case the purpose or purposes described by s 198 (1a) appears to me to fall far short of prohibiting all building except that of which the Council may approve. We are not here dealing with some evil practice or conduct, some trade or vocation obnoxious to the comfort, convenience and amenities of a neighborhood,

some objectionable or noxious condition which may arise where human beings dwell, some pest or pestilence.

We are dealing with one of the essential services of human life — the provision of habitations and other buildings for human use. Everyone knows that the incidents attending the planning and construction of buildings need control. But no one would suppose that it was intended by the Legislature to allow a municipality to suppress all building except that which in its uncontrolled discretion it should think fit to allow in individual cases. If, because of a growing policy of subjecting the ordinary activities of the individual to the administrative control of public bodies, it appeared wise to the Legislature to entrust municipalities with so large a power, it would not be done by the vague conjunction of the words 'regulating and restraining'. The power contained in s 198(3f) would not cover so general a reservation as that of all buildings.

[47] The distinction between that case and the present one is plain. In *Swan Hill*, the restriction was against an essential service of human life ie a place to dwell. In contrast, s 70A of the 1974 Act provides for the approval of plans and specifications. As we have seen earlier, the approval by the respondent would be subject to the by-laws ie the Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992.

[48] Further, as gleaned from the various judgments in *Swan Hill*, the High Court of Australia was inclined to render the relevant by-law prohibitory because:

(a) the language used in that by-law was 'regulate and restrain'. The court was of the view that 'restrain' ought to be taken to mean 'to prohibit' and since this was wider than 'to regulate', the net effect was a prohibition. It has to be noted that s 70A here is worded differently; and

(b) Rich J himself noted that the purpose of the by-law in *Swan Hill* was not to regulate pests or pestilence. It forbade something integral to human dwelling. Contrasting this rationale with the present case, here Parliament intended to create a provision with the express purpose of regulating environmental harm. This is analogous with Rich J's view on controlling 'pests and pestilence.

[49] The second case referred to in the question is the case of *Selangor Pilot Association*. It is necessary to appreciate what that case concerns. The respondents were pilots under the Port Authorities Act 1963 ('the PAA'). The pilots had been carrying out the business of providing piloting services within a certain area of Port Klang under the Merchant Shipping Ordinance 1952 ('the Ordinance'). The PAA was amended in 1972 adding two new ss 29A and 35A to the Ordinance. The effect of these new sections was to empower the port authority to declare an area as a pilotage area, in which event no person may act as a pilot in that area unless employed by the port authority. The Port

Klang Authority declared Port Klang as a pilotage area. Some members of the association elected to work for the authority. But other members refused to work for the authority. They sued the Federal Government and the Port Klang Authority claiming that the amendments to the PAA were unconstitutional as it deprived them of their right to property (goodwill and livelihood) and that they were therefore entitled to compensation. The appellant argued among others that the respondent had not been deprived of any property and that a distinction should be drawn between on the one hand a mere negative prohibition of property (the pilots could operate as pilots elsewhere) and on the other hand actual taking of property (which had not happened here).

[50] The High Court dismissed the respondent's claim. The respondent appealed and the Federal Court allowed the appeal. The Federal Court, among others, held that the respondent had been legislated out of business and that while it is true that they were not deprived of the physical assets of their business, nevertheless they have suffered an abridgment of the incidents of their ownership, they have been deprived of the business of supplying pilotage service in Port Klang though only by a negative or restrictive provision interfering with the enjoyment of their property. It was further held that as s 35A omits to provide for adequate compensation it contravenes art 13 of the Federal Constitution.

[51] The appellant appealed to the Privy Council. The Privy Council allowed the appeal with a 4–1 majority (Lord Salmon dissenting). The Privy Council held that the restrictions placed on the activities of some members of the respondent as licensed pilots did not deprive them of property. The Privy Council was of the view that the deprivation of the respondents of their property was in accordance with the law. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither right being property. It was also held although a person may be deprived of property by a mere negative or restrictive provision, it does not follow that every provision that leads to deprivation also amounts to compulsory acquisition or use.

[52] From the foregoing discussion, it is clear that the main issue in *Selangor Pilot Association* was whether the restriction on the exercise of a pilot's rights given by the grant of a license amounted to a deprivation of property and in violation of art 13 of the Federal Constitution. It is not a case where the court had to decide whether a provision in a statute is prohibitory or regulatory in character. We do not think that case directly supports the legal proposition that a statutory provision is merely regulatory in character if its effect is to subject a certain activity to the requirement of an administrative approval or license. We therefore agree with the submissions of learned counsel for the appellant only to this extent: the Court of Appeal in the present case erred when it said, 'This

issue had been deliberated by the Privy Council case of *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 ... In its deliberation, the Privy Council as observed by Lord Viscount Dilhorne, stated that the first question for consideration was whether the restriction on the exercise of a pilot was a prohibition. The Privy Council held that the restriction placed was not a prohibition but merely regulatory in nature. This was because the restriction placed on the activities of the individual license pilots did not deprive them of property'.

[53] To the above observation, we will add that we do not agree with the submissions of learned counsel for the appellant that a proper reading of *Selangor Pilot Association* should have led the Court of Appeal to the conclusion that the said s 70A is prohibitory in nature. This is untenable and not what the Privy Council decided. As we have stated earlier, it is not a case where the court had to decide whether a provision in a statute is prohibitory or regulatory in character. The Privy Council was not called upon to determine whether the amendment to the PAA was either regulatory or prohibitory as that had no difference to the question whether they were deprived of their property. Either way there was deprivation. The question was more of whether the said deprivation was in accordance with law. The above is reflected in the following words of Viscount Dilhorne (for the majority):

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision, which leads to deprivation, also leads to compulsory acquisition or use. If in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which it vas within the competence of the Legislature to pass.
>
> In relation to Article 13(2) the question to be answered is: Was any property of the Association compulsorily acquired or used by the Port Authority? Only if there was, could there have been a failure to comply with Article 13(2). The only property, launches, etc, acquired by the Port Authority from the Association was acquired by voluntary agreement. Even if the right of the Association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the Association's right to employ pilots was not acquired or used by the Port Authority. Its right to employ them was given to it and acquired by it from the Legislature.
>
> It may be that the Association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired.

[54] Even if we consider the judgment of the dissenting judge, Lord Salmon, it would have made no difference to the *Selangor Pilot Association* case if the

amending Act were regulatory or prohibitory. The real question for the Board was whether the Act, no matter its nature, was a lawful deprivation of property. In His Lordship's view, the Act itself was to such an extent that it amounted to an unlawful taking of property. At pp 140–141, His Lordship said:

> It has been argued on behalf of the appellants that the amending Act was merely regulatory: that it only regulated the provision of the pilotage services in Port Swettenham but did not confiscate the respondents' business which had since 1946 consisted of the provision of these services. Even if the Act could properly be described as merely regulatory — which in my view it cannot/would adopt and rely upon the language of Holmes J in (1922) 260 US at p 417 cited by Viscount Simonds in *Belfast Corpn v OD Cars Ltd* [1960] AC 490 at p 519:
>
> > The general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.
> >
> > The Act of 1972 went so far and must have been recognized by the Legislature as going so far as making it inevitable that the Authority would take the respondents' business immediately the Act came into force. If, contrary to my view, the amending Act can properly be characterized as merely regulatory and it does not go far enough to be recognized as a taking, it is impossible to imagine any regulation that could be so recognized.

[55] The next and last case referred to in the question is the decision of this court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*. The respondent had been barred entry from the State of Sabah. He made an application for judicial review challenging the decision of the Director of Immigration disbarring him from entry. The question before the Federal Court was substantially whether the relevant sections of the Immigration Acts 1959/63 allowing the Director to make that decision were constitutional. Learned counsel brought to our attention the following passage from our judgment in that case:

> ... Here, we need to refer briefly to the Privy Council decision in Selangor Pilot Association. The Association had been carrying on the business of providing pilotage services within certain areas of the Port of Klang and they had in fact a monopoly of the business. The Port Authorities Act 1963 was amended by the Port Authorities (Amendment) Act 1972 which added two new sections, the effect of which was to prohibit the respondents from carrying on their business, within the pilotage districts.

[56] On the basis of the above paragraph, learned counsel argued that s 70A of the 1974 Act is prohibitory in nature. The appellant cited this authority on the grounds that it affirmed and followed *Selangor Pilot Association*. The first point to note is that the case concerned the issue of whether the exclusion of the right to be heard as provided in s 59 of the Immigration Act 1959/63, in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprived the respondent of his

right to livelihood was unlawful and unconstitutional in the light of the express guarantees enshrined in arts 5 and 8 of the Federal Constitution. The question before the Federal Court was therefore irrelevant to the question in the present appeal. There the Federal Court was not all called upon to interpret whether a given provision is either regulatory or prohibitory. The ratio of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* has nothing to do with the question posed herein; and in any event, the Federal Court only relied on the *Selangor Pilot Association* case analogously to hold that arts 5 and 8 rights of the Federal Constitution could be restricted in accordance with law. We do not think that the case takes the appellant's case very far.

[57] At this point, we would refer to the two cases relied on by the appellant. First, is the case of *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369; [1994] 2 CLJ 143. The ratio of this case has nothing to do with the facts of the present appeal. The question for the Supreme Court was whether a contract made in contravention of s 45(1) of the Banking and Financial Institution Act 1989 ('the BAFIA') is illegal. The section provides that no person shall enter into an agreement or arrangement to acquire or dispose any interest in the shares of a license local institution without first obtaining approval from the Finance Minister. The Federal Court arrived at the general proposition that a contract made against such prohibitory language is illegal unless the section itself saved the validity of the contract through clear language to that effect. It was in effect an expression of the apex court's view as to whether a contract may be expressly or impliedly in contravention of law. This judgment certainly did not purport to set out any determinative rule on how regulatory provisions may be distinguished from prohibitory ones. The case does not assist us at all.

[58] The second case is *M Pentiah and others v Muddala Veeramallappa and others* [1961] AIR 1107. A certain committee was conferred with powers to deal with market land. The relevant government then underwent a democratisation process and there were some changes by the committee. One thing led to another and the committee proceeded to sell the said lands to third parties. The petitioners sought quo warranto effectively to challenge the jurisdiction of the committee to sell those lands. The action before the High Court failed and hence the writ petition to the Supreme Court of India. The Supreme Court agreed with the High Court and dismissed the petition. In determining the question, the court considered whether the committee indeed had the power to effect the sale under the relevant statute. At the hearing before us, learned counsel for the appellant relied on the following words of Subba Rao J to argue that when a statute is worded in a negative form, that the statute becomes prohibitory. What the appellant quoted was what Subba Rao J said at para 15: 'Negative words are clearly prohibitory and ordinarily used as a legislative device to make a statute imperative'.

[59] With respect, the appellant cherry-picked the above passage out of context. In this context, the learned judge's opinion expressed in full reads is as follows:

> This section confers on the committee an express power couched in a negative form. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative. If the section is recast in an affirmative form, it reads to the effect that the committee shall have power to transfer any immovable property if the conditions laid down under the section are complied with ... If so, the power of the committee to alienate the property cannot be questioned ...
>
> We have held that s 77 confers an express power on the Municipal committee to sell property subject to the conditions mentioned therein. Therefore, the impugned sales are not ultra vires the powers of the committee. In view of the said express power, no prohibition can be implied from the provisions of s 76.

[60] Two things can be said of the above passage. First is that passage is against the appellant because reading it in full context, the fact that the section was couched in negative terms did not in of itself make it prohibitory. The net result is that the section had to be regulatory. This is because the committee could do what it had done so long as it complied with the conditions. This is the exact same case with s 70A of the 1974 Act. And secondly, even if we take the above case at its highest, it was not per se concerned with the question of what is regulatory and what is not. This case is of no support to the appellant's argument.

[61] We now revert to the issue at hand. It is true that as landowner of the subject lands, the appellant has proprietary rights or entitlement over minerals and rock material found in the said land. As we have pointed out earlier, Condition B states that any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundary of the land shall not affect the appellant's subject lands. To recapitulate, quarry or mining activities would fall within the ambit of the term 'earthworks'.

[62] Does s 70A prohibit earthworks? We must begin the task of interpretation of the provision by carefully considering the language used. Although the language is clear and unequivocal, in an inquiry such as this, we must examine more than the label itself to determine the intent of the legislature and the nature of the statute (see *Edinburg Street Tramways v Torbain* [1877] 3 AC 58 and *Attorney-General for Canada v Hallet & Carey Ltd* [1952] AC 427). The section expressly provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto. In this regard, from a plain reading of s 70A, there is no express provision

prohibiting earthworks absolutely. The provision generally permits the activities at issue, subject to regulation. There is no doubt that this provision imposes certain restrictions on earthworks.

[63] Under the scheme of the 1974 Act, an important point to note is that as the authority responsible for granting earthworks plan approval, the respondent is responsible for controlling, supervising and regulating the manner in which earthworks are carried out and to ensure that the landowner at all times complies with the procedural conditions imposed. This is an important and crucial point which we must look closely.

[64] The respondent's duties of controlling, regulating and supervising earthworks can be seen from the following provisions. Submission and approval of earthworks plans are mandatory under s 70A(1) of the 1974 Act as a pre-condition to the commencement of any earthworks. Under the 1974 Act, the respondent is given power to grant earthworks approval. In exercising the discretionary powers the respondent must exercise it reasonably and in accordance with the terms of the 1974 Act. It bears noting that the respondent may impose such conditions as it deems fit (s 70A(3)). What is even more important is that the respondent may order the immediate cessation of the whole or any part of the earthworks if the safety of life or property is affected or is likely to be affected by any earthworks (s 70A(4)). The respondent can therefore invoke this power if the activity is established to be injurious to the land and environment. Notably, the respondent may, from time to time, give such directions as it deems fit in respect of any earthworks, and the same shall be complied with by the person to whom such directions are given, and where such directions are not complied with the local authority may order the cessation of the whole or any part of the earthworks (s 70A(5)). The respondent may enter upon any land at any hour of the day or night without notice to the owner or occupier thereof for the purpose of executing any work under this section or for carrying out any inspection for the purpose of this section (s 70A(8)). Another matter that must be noted is that any person who contravenes any provision of this section or fails to comply with any direction or order given under this section or does any act to obstruct in any manner whatsoever the entry or the execution of any work authorised to be effected or executed under this section by or on behalf of the local authority shall upon conviction be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both, and in the case of a continuing offence to a fine which may extend to five hundred ringgit for everyday during which the offence is continued (s 70A(9)).

[65] We note in this regard that during the parliamentary debate in relation to the amendment to introduce s 70A of the 1974, it was emphasised by the

Minister that s 70A would be applicable to the mining industry for the purposes of controlling environmental pollution (see the relevant extracts from the Parliamentary Reports (*Hansard*) in *Penyata Rasmi Parliament* dated 3 May 1974, pp 1561–1562). In short, the 1974 Act provides the foundation for the development of an effective, efficient and competitive regulatory environment for the street, drainage and building sector including mining industry.

[66] It is important to note that The Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992 enacted under s 70A(17) of the Act provides detailed requirements, specifications and procedures in relation to the earthworks approval process. The respondent when considering and approving an earthworks plan is bound and guided by the provisions of the subsidiary legislation. Hence, the respondent's discretion in granting earthwork approval is not absolute or arbitrary but is confined and restricted to considering and ensuring that the plans conform with the prescribed standards to ensure safety in accordance with the guidelines. Such discretionary powers are not left without legal limitations. The respondent must use the powers judiciously and within the limits of the powers prescribed by the law. As held by the Court of Appeal in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17:

> ... a public decision-maker...upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion.

[67] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle and policy, for all intents and purposes, s 70A relates to the regulation and supervision of earthwork activities. The point which has a strong bearing on this issue is that the approval of earthwork planss is required to enable the respondent as the local authority to control, regulate and supervise operations such as supervision of hill slope cutting, supervision of hill gradients; supervision of cleanliness; supervision of public safety; supervision of the water, silt and sediment flow; and supervision of the boundaries and the interests of adjoining land owners. Since earthworks directly threatens physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent is empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent has a public policy interest in controlling the earthworks.

[68] Simply put, s 70A in our opinion is regulatory and not prohibitory, in that it only regulates the procedure for carrying out earthworks. Section 70A does not prohibit earthworks absolutely. Clearly the total effect of this section

is regulating not only the appellant but also others who carry out any earthworks including quarry activities. It imposes the procedure for carrying out earthworks including quarry activities. The requirement for earthworks approval under s 70A does not amount to prohibition of quarrying since the purpose of s 70A is to regulate the way quarrying is to be conducted so as not to endanger or harm the environment, and is essentially for public good. The restriction placed merely ensures that the proprietary rights of the appellant over the subject lands are exercised in a proper and responsible manner.

[69] We therefore agree with the Court of Appeal that s 70A does not prohibit quarrying activities but merely regulates such activities. Condition B only gives the appellant the right to quarry but it does not mean that the appellant can carry out quarry activities in any manner, as it likes. Condition B does not exempt the appellant as landowner of the subject lands from having to comply with the provisions of s 70A of the 1974 Act, which regulate and supervise quarry activities.

CONCLUSION

[70] In consequence and in view of all the above, our answer to the question of law is as follows: s 70A of the Street, Drainage and Building Act 1974, which, inter alia, provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, is not prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 and carries a condition which states that the land in that title shall not be affected by any provision of the National Land Code or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land.

[71] The result is that this appeal fails and must be dismissed with costs.

[72] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as Justice Ramly Haji Ali had since retired.

Appeal dismissed with costs.

Reported by Ashok Kumar